In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 942

OTHELLO WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 65; Pet. App. 18) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 28, 1957 (R. 66). The petition for a writ of certiorari was filed on April 26, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for bribery of a policeman to give protection to an illegal numbers business,

documentary evidence showing that petitioner was engaged in such business was admissible.

2. Whether closing argument of government counsel, in reply to a statement that petitioner was only a "little fellow", that petitioner wanted to protect a booming business constituted prejudicial error.

3. Whether the court properly received in evidence the transcript of petitioner's voluntary, unchallenged testimony at a pre-trial motion to suppress certain evidence, admitting that he had paid a bribe to protect another person's numbers business.

STATUTE INVOLVED

The statute involved is Section 22-704, District of Columbia Code (1951 Ed.), and is set forth in the Petition, Appendix A, pp. 17-18.

STATEMENT

Petitioner was convicted on three counts of an indictment returned in the United States District Court for the District of Columbia charging that, in the summer of 1954, he corruptly gave money to an officer of the Metropolitan Police Department, with the intent to influence his action respecting enforcement of the gambling laws, in violation of 22 D.C. Code (1951 Ed.) 704 (R. 3-5, 7-8). Concurrent sentences of imprisonment for 1½ years to 4½ years on each of these counts were imposed (R. 11-12). On appeal, the conviction was unanimously affirmed (R. 12, 66).

The evidence showed that on July 14, 1954, police Captain Monroe told officer Thoman that petitioner was in the numbers business and wanted some protection, and gave Thoman petitioner's telephone number (R. 17-18). When Thoman telephoned that evening,

he asked if Captain Monroe had told petitioner about him, and petitioner answered, "Oh, yeah, yeah, I understand. Where can I see you?" (R. 18-19). At the arranged meeting, petitioner "stated that he had been away for sometime and that he wanted some protection in his office; that he didn't care about every little old two-cent writer out in the street; that he wanted protection for himself in his office" (R. 20-21). A price of $250 per month for protection was agreed upon. Petitioner paid this amount to Thoman (R. 21-22) who delivered it to his superiors (R. 24, 38).

On August 17, 1954, petitioner, after telephoning to arrange a meeting, paid $260 to Thoman (R. 25-26) who turned it over to his superiors (R. 27).

On September 14, 1954, Captain Layton searched Thoman and removed his money before Thoman left to receive another payment from petitioner (R. 27, 38). At the meeting place, petitioner entered Thoman's car, talked about how bad the numbers business had been, and paid Thoman $250 (R. 27-29). Thoman turned over the $250 early the next morning (R. 30, 40-41).

On September 14, 1954, a few minutes after petitioner had paid Thoman, he was arrested. He said he did not know anything about the $250; that it was Thoman's money (R. 30, 39). In a search of petitioner's person, there were found adding machine tapes and papers used in the numbers business. One document indicated a one-day gross business of $4,049.12 and a net win of $2,525.12 (R. 43). Defense counsel argued that there was no necessity for admitting this evidence for the purpose of showing motive and design (as government counsel had urged) since defense counsel had admitted that petitioner had passed the money

to Thoman. He argued that this was an effort to show that petitioner was a big operator (R. 44-45). In his opening statement, defense counsel had said that he was going to rely on the defense of entrapment (R. 14-16).

In closing argument, petitioner's counsel stated (R. 61):

> Washington is just a little fellow. But there are those who love him. He is a human being the same as we are. And he himself is subject to all the human frailities.
>
> * * * * *
>
> Mr. Troxell has brought in evidence these little numbers slips allegedly to show you that this man was a gambler and to show that he gave him this money not for any reason but to protect his gambling enterprise. Ladies and gentlemen, Mr. Troxell—that is his apparent reason.
>
> Do you know why he showed you those pieces of paper? He didn't have to show you those pieces of paper to show you Washington was a gambler. We told you that. We admitted that. He wanted to show you that on one day some pieces of paper showed that he took in $2,000, so that you can say, "To hell with him. He is a big shot. If we convict him, what the heck, he is a gambler anyway."
>
> But please don't forget that he is not charged with gambling.

Replying to this, government counsel stated in his closing argument (R. 62):

> Mr. TROXELL: May it please the Court, I shall be brief. Counsel has suggested that Washington is a little fellow. The evidence is before you on that

point. He is not a little fellow. He wanted to protect a booming business. The booming business is evidenced by the net amount. The gross was over $4,000 and the net amount was something like $2,512 on September 14. I agree with counsel that this man is not being charged with gambling. He is charged with bribery.

Petitioner had made a pre-trial motion to suppress, as the result of which the District Court ordered petitioner's 1950 Chrysler sedan and $159.65 of his own money (apart from the bribe) returned to him (R. 6-7). Petitioner had taken the stand in that proceeding, for the reason, according to his counsel, that the judge had said that the affidavit alleging ownership was insufficient (R. 47). On cross-examination in that proceeding, in distinguishing between the money petitioner was claiming and the bribe money, petitioner was asked if he had earlier given money to Captain Thoman (R. 50-51). He admitted that he had, and in response to questioning stated that the purpose was to protect others in the numbers business (R. 51). This testimony was introduced in evidence, over petitioners' objection (R. 48).

ARGUMENT

1. Petitioner argues that it was error to admit in evidence the numbers documents seized at the time of his arrest since they served no purpose beyond trying to impress the jury that petitioner was a big operator. But counsel, in his opening statement, had said that he was going to rely on the defense of entrapment. It was relevant generally, in establishing the offense charged, to show that petitioner had a very good motive for attempting to bribe police officers. Compare *Ladrey* v. *United States*, 155 F. 2d 417, 419 (C.A. D.C.), certiorari

denied, 329 U.S. 723, a prosecution for attempted bribery of a witness to an abortion case, in which the witness was permitted to testify concerning the nature of the operation performed upon her. It was particularly relevant to show the reason for the bribe in view of the raised defense of entrapment. And in that connection, the fact that petitioner was a big, rather than a small, operator would be a relevant consideration even if the evidence were, as it was not, admitted for that purpose.

2. The reference to petitioner as a big operator did not come merely because the documents referred to in point 1 had been introduced in evidence. It was petitioner's counsel who interjected that issue in the case by arguing that petitioner was only a "little fellow". It was in response to that statement that counsel pointed out that petitioner wanted to protect a booming business.

There was no impropriety, as petitioner asserts (Pet. 7-8), in this direct response to subject matter introduced in argument by petitioner's counsel. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 241, 242; *Crumpton* v. *United States*, 138 U.S. 361, 364; *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 637 (C.A. 2), certiorari denied, 329 U.S. 742; *Ochoa* v. *United States*, 167 F. 2d 341, 344 (C.A. 9). Significantly, no objection was made to this reply. The prosecutor's argument was without inflammatory or irrelevant remarks, and he agreed with opposing counsel's statement that petitioner was charged with bribery, not gambling.

3. Petitioner's testimony at the time of the motion to suppress was not, as he claims, involuntary. He was

not subpoenaed, and was not compelled to testify. If his original affidavit failed to show ownership and he took the stand for that purpose, the fault was not the government's. His attorney made no objection when petitioner answered questions concerning the payment to Thoman on September 14, and petitioner did not invoke the privilege. His testimony was, therefore, properly received as an admission against interest. *Powers* v. *United States,* 223 U.S. 303, 313-314.

In any event, since counsel in his opening statement had said that petitioner did not disclaim payment of the money to Thoman, the testimony had no great significance. The testimony runs only to count 4 of the indictment covering the September 14th incident. Since concurrent sentences were imposed on counts 2, 3, and 4 (R. 11-12), the conviction is supported by the other counts. Cf. *Hirabayashi* v. *United States,* 320 U.S. 81, 85; *Pinkerton* v. *United States,* 328 U.S. 640, 641-642, fn. 1.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1957.

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